

It's about Human Rights, Stupid!

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Thanks to Prof. Halberstam for trying to shift the debate away from the critique of the Opinion 2/13 to a more constructive discussion on the way forward and trying to present the Opinion from a different, resolutely constitutional, perspective.

Prof. Halberstam's assessment of the Opinion 2/13 is based on the premise that the EU's constitutional order is, as he put it, a "deep federal-type structure". This federalist approach to Opinion 2/13 (and the autonomy of EU law) appears to be influenced by US constitutional experience and thinking. It neglects some important features of Europe's multi-layered human rights protection system as well as the EU's own constitutional order. Unlike the USA, the EU is not (yet) a federal state. It is composed of sovereign nations which have transferred only some of their competences to supranational institutions. The EU Treaty itself imposes the duty to respect the national identities of Member States inherent in their constitutional and political structures (Article 4(2) TEU). Respect for pluralism is crucial when it comes to fundamental rights protection.

In opinion 2/13, the CJEU appears to be more concerned about primacy than about pluralism or substantive rights. It applies the principle of absolute primacy of EU law to the EU Charter of Fundamental Rights, not only in relation to ECHR rights but also to those guaranteed under national constitutions. It is, however, doubtful that Member States ever intended to give such a far-reaching meaning to the EU Charter. As Prof. Kirchhof recently demonstrated, Article 51 (1) of the EU Charter merely makes the Charter rights applicable, it does not contain a rule about which rights should have precedence over the others ("Kollisionsregel") in situations where Charter rights and rights guaranteed under national constitutions apply in parallel.^[1] It is quite striking that truly federal states like Austria, Germany or the USA allow that constituent entities guarantee higher or different fundamental rights standards, without that being considered as a threat to the primacy, unity or effectiveness of the respective federal law.

The aim and purpose of fundamental rights is not to foster harmonisation or uniformity; they are about the empowerment of individuals and the protection of liberty primarily against state authorities. Uniformity is neither required nor desirable in a Europe composed of sovereign nations, each of which with its own distinctive traditions of fundamental rights protection. What is required is consensus on certain minimum standards. Member States have agreed on those minimum standards back in 1950 when they adopted the ECHR which constitutes a common "shared view" of European human rights law, defining "the margin within which states may opt for different fundamental balances between government and individuals."^[2] By the way, the claim of constitutionalisation is not unique to the realm of EU law. The ECtHR has repeatedly

characterised the ECHR "as a constitutional instrument of European public order (ordre public)". Several authors have also suggested that the ECtHR is – or should become – more like a constitutional court. It is significant that none of the 47 Member States of the Council of Europe opposed the autonomy of its legal order when it accepted the independent external scrutiny of the ECtHR and, as a consequence, the obligation to abide by its judgments even if this requires reviewing the case law of supreme and/or constitutional courts in individual cases or the modification of legislative or constitutional provisions.

We agree with Prof. Halberstam's questioning of the CJEU's use of the 'high' and 'low', maximal and minimal nomenclature in the context of fundamental rights protection. Such rights entail choices as to the appropriate balance between the interests of individuals against those of other individuals or the community. Many rights require a sometimes complex balancing exercise, between the rights of one individual and the interests of other individuals, groups or the general public. A 'race to the top', seeking ever higher standards makes little sense in cases of competing human-rights interests which must be reconciled, such as freedom of expression versus privacy or the right to property versus the right to strike.

In this comment, we can only deal with some of the CJEU's objections, as presented by Prof. Halberstam, namely those concerning the co-respondent mechanism and prior involvement, mutual trust in JHA matters, Article 344 TFEU and Protocol 16. On **CFSP**, we agree with Prof. Halberstam that it may be desirable to extend the CJEU's limited jurisdiction. However, requiring such extension, which will require amendments to the EU Treaties, as a precondition for accession risks making accession practically impossible for the foreseeable future.

As regards the **co-respondent mechanism** and **prior involvement procedure**, the incompatibilities found by the CJEU are primarily technical and may be addressed by amendments and/or additions to the DAA. The main point is whether additional safeguards for the EU are really necessary and would be acceptable to non-EU Member States. As Prof. Jacqu  observed pertinently, "it takes two to tango". The co-respondent mechanism was discussed at length during the negotiations. The provisions were drafted in order to accommodate to fullest possible manner the autonomy of the EU legal order as well as to ensure that the ECtHR does not pronounce itself on the issues of the EU law. Going beyond what has been achieved during the negotiations risks sacrificing the role and status of the ECtHR under the Convention. In any case, in the event of accession, the tasks of the Luxembourg and Strasbourg Courts would be fully complementary. The prior-involvement mechanism was included at the request of the CJEU (and ECtHR). It must be stressed that the 'prior-involvement' procedure would not apply in direct actions against the EU, which are those that are comparable to procedures against other Contracting Parties, but only in the probably rare cases in which the EU will be joined as a co-respondent. In such rather rare cases, non-EU member states eventually accepted, as part of a comprehensive package of compromise solutions, that the procedure is

justified by the considerations of subsidiarity and the 'specific characteristics of Union law', which required the introduction of the co-respondent procedure in the first place, but only limited to questions of validity.

A major goal pursued by accession is to close existing gaps in judicial protection by giving European citizens the same protection vis-a-vis acts of the Union as they presently enjoy vis-a-vis all EU member states. In that context, the **CJEU's objection regarding JHA's matters** appears problematic. The CJEU's reasoning seems questionable even from a purely EU law perspective. While the 'values' of the EU include human rights and the rule of law, there is no mention of the primacy of EU law, of mutual trust in JHA matters, or of preventing any international court from exercising jurisdiction over EU-related matters. Under the EU treaties, mutual recognition is merely a 'principle' to be used to facilitate judicial cooperation among EU member states. It should not be weighed against, or, even worse, used to escape compliance with legal obligations to respect fundamental rights under EU primary law. Respect for fundamental rights constitutes a key component of the area of freedom, security and justice, as explicitly foreseen by Article 67 (1) TFEU. It is noteworthy that the European Parliament and the EU Fundamental Rights Agency both advocated the use of fundamental rights-based refusal grounds in EU legislation providing for mutual recognition. More significantly, in a recent JHA legal instrument, Directive 2014/41/EU on the European Investigation Order, non-compliance with fundamental rights was explicitly provided for as a refusal ground.

EU member states are not immune from being found in violation of even the core human rights such as Article 3 ECHR, the prohibition of torture and inhuman and degrading treatment and punishment. A recent illustration of the different approaches of the two European courts is the ECtHR's *Tarakhel judgment*, whose individualised assessment of the applicants' situation contrasts with the CJEU's defence of the Dublin system in the *Abdullahi judgment*. These judgments show at the same time that even without accession JHA issues are already before the ECtHR. The challenge to the conception of mutual trust in JHA matters could hardly become more severe than it already is. Rather on the contrary, accession and a strong co-respondent mechanism provide the possibility for comprehensive external scrutiny of the JHA system as a whole, with the active participation of protagonists from both the supranational and the national levels, thereby enhancing both trust in the various mutual recognition systems and human rights protection for the individuals concerned. Exempting JHA matters from the scope of external control would be a curtailment of existing ECHR jurisdiction in one of the core areas where effective fundamental rights protection is most important.

The CJEU's objections regarding **Article 344 TFEU and the exclusivity of the EU adjudication of Member States disputes** could probably be addressed by inserting a provision in the DAA expressly excluding ECtHR's jurisdiction for disputes between member states, or between member states and the EU, regarding the application of the ECHR in the context of the EU law. While being required by the CJEU, the question remains why is it necessary to foresee something in an international treaty with Non-Member States which concerns primarily relations between the EU and its Member

States and which is anyway expressly prohibited by EU law? Paragraph 64 of the draft explanatory report to the DAA explains that this issue was deliberately excluded from the DAA because "...Article 344 [...] states that EU member States 'undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'."

Protocol 16, which was adopted after the conclusion of the negotiations, is not part of the accession package, nor has it even entered into force. If the intention were to restrict the use of the advisory opinion procedure through an amendment to Protocol 16 and/or its explanatory report, it would be a matter for the Council of Europe Member States alone, the EU having neither participated in the drafting of Protocol 16 nor is it covered by the DAA. On substance, the CJEU's objections may be considered technical, requiring simply clarifications in the DAA. However, the necessity of such clarifications remains doubtful, as already demonstrated by Prof. Callewaert. National courts of EU Member States are obliged to refer issues of EU law to the CJEU under the article 267 TFEU. Therefore, it is unlikely that supreme courts would go 'forum shopping' to Strasbourg. Moreover, non-binding advisory opinions under Protocol 16 cannot prevail over binding EU law including the interpretations given by the CJEU in preliminary reference proceedings. In the unlikely event that 'highest national courts' would request an advisory opinion on points somehow linked to EU law, it must be taken into account that the ECtHR has always been careful to respect the autonomy of EU law and to avoid any legal determination capable of encroaching on it. As regards rights guaranteed under both ECHR and EU Charter, by virtue of article 52 (3) of the EU Charter, EU law has itself limited the scope of its autonomy, declaring that the "meaning and scope" of Charter rights "shall be the same as those laid down by the ECHR". Consequently, in this limited area, EU law issues are also Convention issues and vice versa. Two scenarios may be distinguished. First, in all cases where article 267 TFEU applies, there is no threat to EU law autonomy, including on EU fundamental rights. On the other hand, in the rare instances where this provision would not apply and the ECtHR would be asked to give an advisory opinion nonetheless, such an opinion – if the ECtHR accepted to give it – would by definition be confined to "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto". Thus, in keeping with the principle according to which the ECHR only defines minimum standards (article 53 ECHR), such an opinion would be given without prejudice to EU law going beyond the Convention protection level, a scenario explicitly foreseen in the second sentence of article 52 (3) of the EU Charter (unless of course competing rights in multipolar relationships would be disregarded, see above).

We remain convinced that EU accession to the ECHR will eventually put in place the missing link in Europe's system of fundamental rights protection. Only EU accession to the ECHR can ultimately ensure effective protection for individuals, legal certainty and coherence in fundamental rights protection all over Europe.^[3]

This contribution was written in a strictly personal capacity and does not necessarily reflect the official position of the Council of Europe.

[11] Ferdinand Kirchhof 'Nationale Grundrechte und Unionsgrundrechte: Die Wiederkehr der Frage eines Anwendungsvorrangs unter anderer Perspektive' (2014) *NVwZ Neue Zeitschrift für Verwaltungsrecht* 1537-1541.

[12] JHH Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' (1995), reprinted in JHH Weiler *The Constitution of Europe: do the New Clothes Have an Emperor? and other essays on European integration* (Cambridge, Cambridge University Press, 1999) 107–16.

[13] Jörg Polakiewicz, 'The EU's Accession to the European Convention on Human Rights—A Matter of Coherence and Consistency' in Sonia Morano-Foadi and Lucy Vickers (eds.), *Fundamental Rights in Europe: A Matter for Two Courts* (Oxford, Hart Publishing, 2015).



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All the best, *Max Steinbeis*

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